SUPREME COURT, U. S.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1969

No. 419

RICHARD S. SIMPSON,
Petitioner,

vs.

UNION OIL COMPANY OF CALIFORNIA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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Respondent's Brief in Opposition, it is respectfully submitted, makes clearly erroneous assertions.

1. It is contended by respondent that the interpretation placed upon the mandate of this Court by the lower courts is binding upon the Supreme Court of the United States and is indisputable under the so-called "two court rule". Such assertions are contrary to the doctrine that the court issuing the mandate makes its own con-

struction of it, and is not bound by the construction given to it in the lower courts. *In re Sanford Fork & Tool Co.*, 160 U.S. 247 (1895); *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). In *In Re Sanford Fork & Tool Co.*, this Court stated at 256:

> "The opinion delivered by this court at the time of rendering its decree may be consulted to ascertain what was intended by its mandate, and either upon an application for a writ of mandamus or upon a new appeal it is for this court to construe its own mandate, and to act accordingly."

That the lower courts' interpretation of this Court's mandate in *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964), is erroneous, it is respectfully urged, is shown by the recent opinion of the District Court in *United States v. General Electric Co.*, ... F. Supp. ..... (S.D. N.Y. 1969), 1969 Trade Cases ¶ 72,891. The District Court in *General Electric*, on cross motions for summary judgment involving the legality under the antitrust laws of General Electric's consignment system with respect to light bulbs came to the conclusion that this Court in *Simpson* did not overrule *United States v. General Electric Co.*, 272 U.S. 476 (1926). The District Court in *General Electric*, supra, noted that this Court differentiated Union Oil's system from the General Electric system before the court in 1926 (at p. 87, 368).

2. Respondent attempts to avoid this Court's decision in *Stovall v. Denno*, 388 U.S. 293, 301 (1967) by asserting that there was a case or controversy decided in *Simpson* because other parties may obtain a benefit from the de-

cision. Respondent supports its position with its own construction of the mandate in *Simpson*. But it is urged that this Court did not intend to apply its last sentence to petitioner, and that *Stovall* prevents the prospectivity of *Simpson* to Mr. Simpson. *U.S. Const., art. III* on its face applies to cases or controversy brought by the parties, and it is of no benefit to the petitioner Simpson that the government or other parties might utilize *Simpson*. Section 4 of the Clayton Act provides for the award of compensatory damages, and Congress has allowed treble damages to encourage a litigant to seek his compensatory damages. There is no resolution of a case or controversy brought under Section 4 of the Clayton Act, it is respectfully urged, unless it results in the award of these compensatory damages to a successful litigant. *Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906). As recently stated by this Court in *Fortner Enterprises, Inc. v. United States Steel Corp.*, ... U.S. ....., 89 S.Ct. 1252, 1258 (1969):

> "As the special provision awarding treble damages to successful plaintiffs illustrates, Congress has encouraged private antitrust litigation not merely to compensate those who have been directly injured but also to vindicate the important public interest in free competition."

3. Respondent also appears to argue that this Court may not review the granting or denial of a motion for a new trial based on the excessiveness of a jury verdict. Such contention appears erroneous by this Court's decision. *Grunenthal v. Long Island Ry. Co.*, ... U.S. .....,

89 S.Ct. 331 (1969). Also, the appellate court below went further here and ruled on the petitioner's evidence, the trial court's instructions and failure to give certain of the appellee's instructions. But petitioner's damage evidence was admissible and the instructions were not attackable. *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, (1946); *Perkins v. Standard Oil Co. of Calif.*, ... U.S. ....., 89 S.Ct. 1871 (1969); *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir., 1964) cert. denied 377 U.S. 933 (1964).

4. Appellant urges that Simpson's earnings as a Mobil dealer subsequent to the time he was ousted from the Union Oil Company's property was greater than his earnings as a Union Oil dealer. But Simpson's post ouster earnings are irrelevant because there was here a total destruction of his business. *Lessig v. Tidewater Oil Co.*, supra. In fact, the differences are negligible. (D.'s Ex. K). The crucial points, of course, are that Mr. Simpson would have made at least $9,700.00 in 1958 and thereafter in his Union Oil service station business, and it is unreasonable to conclude that Mr. Simpson's business opportunities ended when his Union Oil service station business reached its potential. Mr. Simpson was in the process of building a highly profitable business at an excellent location at one of respondent's finest stations (Tr. 615, 575). That Mr. Simpson did not suffer physical injuries as a result of Union Oil's actions increases the ability for Mr. Simpson to have used his Union Oil service station business as a stepping stone to further economic success; it does not limit his damages.

CONCLUSION

The judgment below should be reversed and the jury verdict should be reinstated.

Dated, San Francisco, California,
September 12, 1969.

Respectfully submitted,
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